Supreme Court, U.S.
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No. 94-551

In The

Supreme Court of the United States

October Term, 1994

JOHN HARRIS,

Petitioner,

v.

CITY OF AKRON, GREG BURGOON, JOHN HYMES, and JOHN DOE(S),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

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This Reply Brief is submitted by petitioner in response to Part III of respondents' Brief in Opposition to Petition for Writ of Certiorari in which respondents argue that the issue of the adequacy of Ohio's inverse condemnation remedy does not involve an important issue of federal law.

In the second question presented for review, petitioner asked this Court to review whether a state inverse condemnation suit may be an adequate postdeprivation remedy for purposes of a procedural due process claim when the state grants political subdivisions an immunity from such suits.

In their Brief in Opposition, respondents state that they "have not argued *in this litigation*" that political subdivisions in Ohio have a statutory immunity from inverse condemnation claims, *see* Brief in Opposition 11 (emphasis added), and they argue that this Court should not review this case because of the presence of an unsettled issue of Ohio law as to the availability of an immunity. Brief in Opposition 13-14.

Although respondents did not expressly refer to "inverse condemnation" claims in arguing for immunity from state tort claims, there is no suggestion in their submissions to the lower courts that the state constitutional origin of the inverse condemnation remedy might yield a different conclusion about the availability of an immunity.[1]

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[1] Respondents have not conceded that they are not entitled to absolute immunity for inverse condemnation claims, but they have carefully argued only that Ohio Revised Code 2744, the

Petitioner recognizes that the availability of an immunity for political subdivisions in inverse condemnation claims is an open issue in Ohio, *see Solly v. City of Toledo*, 218 N.E.2d 463 (Ohio 1966), and acknowledged this. *See* Petition 21-22. Nonetheless, petitioner reiterates its position that the court of appeals failed to consider the availability and significance of this potential immunity when it concluded that petitioner had an adequate post-deprivation remedy in the form of an inverse condemnation suit and affirmed the dismissal of petitioner's procedural due process claim.

In arguing that petitioner has not presented an important issue of federal law, respondents rely on the fact that Ohio law is unsettled, but petitioner obviously is not asking this Court to resolve an unsettled issue of state law. Nonetheless, because the meaning of state law is relevant to the disposition of petitioner's procedural due process claim, the failure of the court of appeals to address this issue raises a substantial federal issue.[2]

Political Subdivision Tort Liability Act, is not applicable to constitutionally-based inverse condemnation claims. Thus, it can be expected that respondents will attempt to interpose an immunity defense in any state court litigation raising an inverse condemnation claim.

[2] The court of appeals discussed the state inverse condemnation remedy in the context of a taking claim that was not a subject of the appeal. Nonetheless, there is no reason to assume that this discussion was not equally applicable to the adequacy of petitioner's postdeprivation remedies for purposes of the procedural due process claim that was before the court of appeals.

The question of the *adequacy* of the state inverse condemnation remedy is clearly a federal issue, and the courts below treated the state remedy as adequate despite respondents' earlier effort to argue for immunity. The fact that respondents are now arguing (for the first time in this litigation) that the state constitutional origin of the inverse condemnation remedy alters this issue should not be a basis for denying certiorari. Rather, this new argument provides further support for the suggestion made by petitioner that pursuant to S.Ct. Rule 16.1 this Court should grant the petition and remand this case to the court of appeals for further proceedings. In those proceedings, the court of appeals can address the availability of an immunity to political subdivisions in inverse condemnation actions and the adequacy of this remedy.[3]

Despite the apparent ambiguity of Ohio law, this case raises an important issue involving the proper approach for determining the availability and adequacy of state postdeprivation remedies. It is petitioner's position that where, as in the present case, there is substantial uncertainty as to the availability of an inverse condemnation remedy, the lower federal courts should determine the meaning of state law themselves or through some other device, be it abstention or certification, obtain an authoritative ruling as to the meaning of state law.

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[3] As noted in the Petition for a Writ of Certiorari, Ohio provides a method by which federal courts may certify unclear issues of state law to the Ohio Supreme Court. *See* Ohio Supreme Court Rules of Practice, Rule XVI.

With respect to respondents' waiver argument, petitioner acknowledges that he did not seek further review of the decision of the magistrate judge dismissing his fifth amendment taking claim. Petitioner, however, was *successful* before the magistrate judge on his §1983 procedural due process claim, *see* App. 35-38, although the magistrate judge had treated the inverse condemnation claim as adequate for purposes of the taking claim. App. 33-35. Given the posture of the case at the district court level, there was no reason for petitioner, the prevailing party before the magistrate judge, to file an objection on the issue of the adequacy of the state postdeprivation remedy. In any case, the court of appeals concluded that the state postdeprivation remedies were adequate for purposes of the procedural due process inquiry. App. 16. Thus, it is difficult to see how there was any waiver of the adequacy issue, and the effort of respondents to argue waiver seems designed only to muddy the waters and deter this Court from reviewing this case.

CONCLUSION

As stated in the petition for a writ of certiorari, pursuant to S.Ct. Rule 16.1 this Court should grant the petition for a writ of certiorari and vacate and remand the judgment and opinion of the court of appeals for further proceedings in light of *Waters v. Churchill*, 114 S.Ct. 1878 (1994). Additionally, in any remand, this Court should order the court of appeals to determine the adequacy of the state inverse condemnation remedy in light of the unsettled nature of Ohio law. Alternatively, this Court

should grant the petition for a writ of certiorari to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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